BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
CENTRAL PUGET SOUND REGION
STATE OF WASHINGTON

KOONTZ COALITION,

Petitioner,

v.

CITY OF SEATTLE,

Respondent.

Case No. 14-3-0005

(Koontz)

FINAL DECISION AND ORDER

SYNOPSIS

On December 3, 2013, the City of Seattle adopted Ordinance 124388, which amends the City's zoning code Sections 23.49.012 and 23.49.015 to change the contribution amounts for downtown affordable housing and childcare incentive programs and to establish automatic inflationary adjustments in the City's affordable housing incentive programs. The City's action was challenged by the Koontz Coalition, a group of property owners. Petitioners alleged the Ordinance violates the affordable housing provisions of RCW 36.70A.540 by increasing fees without increasing incentives.

The Board determined the Koontz Coalition failed to establish the challenged Ordinance violates RCW 36.70A.540 or is inconsistent with the City's comprehensive plan.

I. PROCEDURAL BACKGROUND

Petitioner Koontz Coalition (Koontz) challenges the City of Seattle's adoption of Ordinance 124388 revising contribution amounts for downtown affordable housing incentive programs. Legal Issues in this case are as follows:

1. Does the Ordinance violate RCW 36.70A.540 by increasing fees without increasing incentives?

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2. Does the Ordinance violate RCW 36.70A.106 because it was not sent to the Department of Commerce for review and comment before it was adopted?

3. Does the Ordinance violate RCW 36.70A.040 because it is inconsistent with the Comprehensive Plan, including policies UVG-4, UVG-7, UVG-20, UVG-29, UVG-30, UVG-31, UVG-32, UV-34, H8, DT-G2, and DT-HP3?

4. Does the Ordinance violate SEPA (RCW 43.21C) because, on information and belief, it was adopted without first complying with the requirements of SEPA?

Ruling on the City's dispositive motion, the Board dismissed the SEPA issue for lack of standing and the Commerce issue as withdrawn.[1]

The parties filed prehearing briefs as follows:

- Petitioner Koontz Coalition's Prehearing Brief, June 5, 2014 (Koontz Prehearing Brief);
- City of Seattle's Prehearing Brief, June 18, 2014 (City Response);
- Petitioner's Reply Brief, June 30, 2014 (Koontz Reply).

The Hearing on the Merits was convened July 8, 2014, in Seattle City Hall. Present for the Board were Margaret Pageler, presiding officer,[2] Cheryl Pflug and William Roehl. Petitioner Koontz Coalition appeared by its attorneys G. Richard Hill and Ian Morrison. Respondent City of Seattle was represented by City Attorney Jeff Weber. Mary Ann Pennington provided court reporting services.

The hearing afforded each party the opportunity to emphasize the most cogent facts and arguments relevant to its case. Board members asked questions seeking to thoroughly understand the history of the proceedings, the important facts in the case, and the legal arguments of the parties.

[1] Order on Motions, May 17, 2014.
[2] At the outset of the hearing, Board member Pageler disclosed that Ordinance 120443, establishing the fees amended in the challenged ordinance, was adopted during her tenure on Seattle City Council in 2001.

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II. JURISDICTION AND STANDARD OF REVIEW

A. Board Jurisdiction

The Board finds the petition for review was timely filed, pursuant to RCW 36.70A.290(2). The Board finds the petitioner has standing to appear before the Board, pursuant to RCW 36.70A.280(2)(b). The Board finds it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1).

B. Presumption of Validity, Burden of Proof, and Standard of Review

The Growth Management Hearings Board is charged with adjudicating GMA compliance and, when necessary, invalidating noncompliant comprehensive plans, development regulations, or amendments thereto.[3] The Supreme Court explained in *Lewis County v. Western Washington Growth Management Hearings Board*:[4]

> The Board is empowered to determine whether [jurisdiction's] decisions comply with GMA requirements, to remand noncompliant ordinances to [the jurisdiction], and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance.

Pursuant to RCW 36.70A.320(1), comprehensive plans and development regulations, and amendments to them, are presumed valid upon adoption.[5] This presumption creates a high threshold for challengers as the burden is on the petitioners to demonstrate that any action taken by the city is not in compliance with the GMA.[6]

The scope of the Board's review is limited to determining whether the city has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review.[7] The GMA directs that the Board, after full consideration of the petition, shall determine whether there is compliance with the requirements of the GMA.[8] In making its determination, the Board shall consider the criteria adopted by the Department of

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[3] RCW 36.70A.280, RCW 36.70A.302.
[4] 157 Wn.2d 488, 498, n. 7, 139 P.3d 1096 (2006).
[5] RCW 36.70A.320(1) provides: "[C]omprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption."
[6] RCW 36.70A.320(2) provides: "[T]he burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter."
[7] RCW 36.70A.290(1).
[8] RCW 36.70A.320(3).

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Commerce under RCW 36.70A.190.[9] The Board shall find compliance unless it determines that the city's action is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the GMA.[10] In order to find the city's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been committed."[11]

In reviewing the planning decisions of cities and counties, the Board is instructed to recognize "the broad range of discretion that may be exercised by counties and cities" and to "grant deference to counties and cities in how they plan for growth."[12] However, the city's discretion is not boundless; its actions must be consistent with the goals and requirements of the GMA.[13] As to the degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated:[14]

> The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard.

Thus, the burden is on the Petitioner to overcome the presumption of validity and demonstrate that the challenged action taken by the city is clearly erroneous in light of the goals and requirements of the GMA.

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[9] Procedural criteria adopted by Commerce pursuant to RCW 36.70A.190(4)(b) are found at WAC 365-196. Commerce has also adopted minimum guidelines pursuant to RCW 36.70A.050 for the classification of agriculture, forest, and mineral lands and critical areas; these rules are found at WAC 365-190.

[10] RCW 36.70A.320(3).

[11] *Lewis County v. WWGMHB ("Lewis County")*, 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006) (citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

[12] RCW 36.70A.3201 provides, in relevant part: "In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community."

[13] *King County v. CPSGMHB,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000) (Local discretion is bounded by the goals and requirements of the GMA). *See also*, *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007).

[14] *Swinomish* at 435, n.8.

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III. THE CHALLENGED ACTION

Ordinance 124388 amends the City of Seattle's affordable housing incentive programs for both residential and commercial development in Seattle's Downtown zones. To develop more buildable area than base zoning allows, the downtown developer must provide affordable housing in a certain amount relative to the bonus floor area or, alternatively, make a cash contribution for each square foot of bonus floor area ("fee-in-lieu"). The commercial bonus program, codified at SMC 23.49.012, has been in existence for many years, with a major revision in 2001. The residential bonus program, codified at SMC 23.49.015, was enacted in 2006. Both programs authorized city administrators to make inflationary adjustments to the fee-in-lieu, but adjustments were not made until adoption of Ordinance 124388.[15]

Prior to revising the commercial bonus program in 2001 and adopting the residential bonus program in 2006, the City of Seattle commissioned studies to determine direct and indirect impact of downtown development on affordable housing, with a view to the RCW 82.02.020 prohibition on development charges unlinked to project-specific impacts.[16] Then in 2006 the Legislature adopted RCW 36.70A.540, an amendment to the GMA authorizing cities to enact affordable housing incentive programs meeting statutory criteria without being subject to RCW 80.02.020. "The city or county may enact or expand such programs whether or not the programs may impose a tax, fee, or charge on the development or construction of property." RCW 36.70A.540(1)(b).

In 2013, in the context of a significant up-zoning of South Lake Union, Seattle expanded the housing bonus program to the whole district.[17] The City commissioned a study for the district to determine "how many affordable housing units can be created while

[15] Ordinance 120443 (2001) provided: "[T]he amount of the voluntary cash contribution to the City's downtown housing fund that would be equivalent to providing floor area of affordable housing units as a condition of bonus floor area are as set forth in the Nexus Analysis. These dollar amounts may be expected to increase."
[16] Index # 54, Keyser Marston Associates, Inc. *Jobs Housing Nexus Analysis, Office and Hotel Buildings Downtown: Seattle Linkage Program,* March, 2001; Index # 56, Keyser Marston Associates, Inc., *Residential Nexus Analysis*, July 2005.
[17] In 2007 the bonus program had been applied to a 1 ½ block area in the Denny Regrade area of South Lake Union. Ordinance 122611 (December 2007).

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providing reasonable return on investment to developers."[18] The Spectrum study indicated the value of increased development capacity would support as much as a four-fold increase in affordable housing investments. The affordable housing fee-in-lieu bonus provisions were recalculated, first adjusting for inflation since 2001, and second, adopting a 20% premium to the fee-in-lieu for residential development. The purpose of the premium is to encourage development of housing units, either on-site or off-site, instead of fee payment. The City reasoned that "developers paying rather than performing does not achieve the City's policy goals for workforce housing in the neighborhood." [19]

The city considered re-setting the in-lieu fees for the housing bonuses available under the downtown commercial and residential zoning, as the downtown zone fees-in-lieu had never been adjusted for inflation. For procedural reasons, the city chose to act first on the South Lake Union rezoning.[20] The South Lake Union rezoning and housing incentive program was adopted May 2013. Subsequently, in December 2013 the challenged Ordinance was adopted. The amount of the fee-in-lieu was raised based on the CPI from 2001 for downtown commercial and from 2006 for downtown residential. The formula for the residential program was revised to apply to gross rather than net square footage, consistent with the commercial and South Lake Union provisions. A 20% premium was applied to residential development to increase the incentive for performance. No changes were made in the amount of housing to be provided relative to the bonus floor area or to the bonus development capacity achievable through the programs. This appeal followed.

IV. LEGAL ISSUES AND DISCUSSION

Legal Issue 1 – Compliance with RCW 36.70A.540

Issue 1. Does the Ordinance violate RCW 36.70A.540 by increasing fees without increasing incentives?

[18] Index # 57. Spectrum Development Solutions, South Lake Union Affordable Housing Bonus Program Review, March 12, 2013.
[19] Index # 2, p. 1. Councilmember Tim Burgess, "Proposal: Creating More Affordable Workplace Housing in Seattle" March 14, 2013, with spreadsheet, "In-Lieu Fees: For Discussion."
[20] Index # 37, City Council staff memorandum, Sep. 18, 2013: Downtown in-lieu fees are codified in sections of the municipal code that were not included in the ordinance title for the South Lake Union rezoning.

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Applicable Law

RCW 36.70A.540 provides, in relevant part:

> (1)(a) Any city or county planning under RCW 36.70A.040 may enact or expand affordable housing incentive programs providing for the development of low-income housing units through development regulations or conditions on rezoning or permit decisions, or both, on one or more of the following types of development: Residential; commercial; industrial; or mixed-use. An affordable housing incentive program may include, but is not limited to, one or more of the following:
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> (i) Density bonuses within the urban growth area;
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> (ii) Height and bulk bonuses;
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> (iii) Fee waivers or exemptions;
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> (iv) Parking reductions; or
>
> (v) Expedited permitting.
>
> (b) The city or county may enact or expand such programs whether or not the programs may impose a tax, fee, or charge on the development or construction of property.
>
> (c) If a developer chooses not to participate in an optional affordable housing incentive program adopted and authorized under this section, a city, county, or town may not condition, deny, or delay the issuance of a permit or development approval that is consistent with zoning and development standards on the subject property absent incentive provisions of this program.
>
> (2) Affordable housing incentive programs enacted or expanded under this section shall comply with the following:
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> . . .
>
> (g) Low income housing units developed under an affordable housing incentive program are encouraged to be provided within developments for which a bonus or incentive is provided. However, programs may allow units to be provided in a building located in the general area of the development for which a bonus or incentive is provided; and

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(h) Affordable housing incentive programs may allow a payment of money or property in lieu of low-income housing units if the jurisdiction determines that the payment achieves a result equal to or better than providing the affordable housing on-site, as long as the payment does not exceed the approximate cost of developing the same number and quality of housing units that would otherwise be developed. Any city or county shall use these funds or property to support the development of low-income housing, including support provided through loans or grants to public or private owners or developers of housing.

(3) Affordable housing incentive programs enacted or expanded under this section may be applied within the jurisdiction to address the need for increased residential development, consistent with local growth management and housing policies, as follows:

(a) The jurisdiction shall identify certain land use designations within a geographic area where increased residential development will assist in achieving local growth management and housing policies;

(b) The jurisdiction shall provide increased residential development capacity through zoning changes, bonus densities, height and bulk increases, parking reductions, or other regulatory changes or other incentives;

(c) The jurisdiction shall determine that increased residential development capacity or other incentives can be achieved within the identified area, subject to consideration of other regulatory controls on development; and

(d) The jurisdiction may establish a minimum amount of affordable housing that must be provided by all residential developments being built under the revised regulations, consistent with the requirements of this section.

Positions of the Parties

Koontz contends RCW 36.70A.540 requires that "any expanded affordable housing incentive programs provide increased residential development capacity."[21] According to Koontz, when Seattle increased the fees developers may pay in lieu of actually creating low-income units in order to earn bonus downtown development capacity, Seattle was "expanding" its program under RCW 36.70A.540(3). Therefore, Koontz reasons, the provision that "the jurisdiction shall provide increased residential development capacity

[21] Koontz Prehearing Brief, at 16.

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through . . . bonus densities, height and bulk increases . . . or other incentives" requires Seattle to increase the development bonus that can be earned through such fees.

The City responds that under RCW 36.70A.540 the affordable housing program as a whole must contain an incentive (e.g., density bonus, height bonus, etc.). The City points out its affordable housing incentive program is voluntary: developers have no entitlement to the extra height or other benefits offered.[22] According to the City, the statute contains no standards for weighing the burden imposed on developers against the public benefit provided, but leaves that within the discretion of local governments.

The City points out the Ordinance makes no change in the amount of housing required to be provided to earn the bonus. It contends the higher new rate structure will encourage developers to use the performance approach and actually develop low-income housing, rather than pay the fee-in-lieu.[23] Thus the City argues the 20% premium makes the program more consistent with RCW 36.70A.540's goal of actually providing affordable housing.

Discussion and Analysis

RCW 36.70A.540 sets requirements for affordable housing incentive programs "enacted or expanded" by local jurisdictions. The statute does not define "expanded." Koontz asserts Seattle expanded its housing bonus program by raising fees by an inflationary adjustment for both residential and commercial development and by imposing a 20% premium for the residential program. Koontz provides no authority for the notion that increasing the fee-in-lieu expands the program.

The Board notes Seattle's affordable housing incentive programs are limited to certain geographic areas of the city - Seattle's downtown and South Lake Union zones. RCW 36.70A.540(3) indicates that enactment or expansion of a program first requires identification of "certain land use designations within a geographic area" where housing needs are to be met. The city must determine that increased residential capacity can be achieved "within the identified area" and that more housing is needed in that area to meet

[22] City Response, at 12.
[23] City Response, at 6.

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growth management goals. RCW 36.70A.540(3)(a), (c). A bonus program may then be enacted or an existing program may be expanded into the land use designations within the targeted area. RCW 36.70A.540(3)(b).

Seattle's housing incentive programs have been enacted or expanded several times to new land use designations in specific areas of the city:

Downtown commercial zones – Ordinance 120443, July 2001;

Downtown residential/mixed use zones – Ordinance 122054, March 2006;

Denny Regrade 1 ½ blocks – Ordinance 122611, December 2007;

South Lake Union – Ordinance 12412, May 2013.

With each program expansion, the development capacity of the identified zones was increased through height bonuses or other incentives, as required by RCW 36.70A.540(3).

Seattle's comprehensive plan speaks of "expansion" of the housing bonus programs in a geographic sense consistent with RCW 36.70A.540(3):

> DT-HP3 . . ."additional areas may be included if such an expansion of the program would be consistent with the goals. . . "
>
> H31 . . . "Consider expanding the use of incentive zoning for affordable housing in neighborhoods outside downtown. . . ."

Thus "expansion" of housing bonus programs has historically denoted extension to other areas of the city. This application of "expansion" is consistent with the plain language of the statute which requires the jurisdiction to target specific geographic areas and zone designations for incentive programs. It is also consistent with Seattle's comprehensive plan provisions.

On its face, then, the challenged Ordinance does not constitute an expansion of Seattle's affordable housing bonus program within the language of the statute or of the comprehensive plan. The Ordinance does not apply the fee-in-lieu to a new geographic area or additional zones. **The Board finds** Seattle has not "enacted or expanded" an incentive program with the Ordinance.

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Koontz protests, however, that the fee adjustments and premium are so high they must constitute a program expansion.[24] The Board notes the Ordinance makes no change to the amount of housing that would be required to earn a bonus under the performance option. Koontz has provided no evidence that the fee changes are greater than the cost of providing the square footage that would otherwise be necessary to earn the existing bonuses. The statute provides that low-income units are encouraged to be provided within the development for which a bonus is provided or in a building in the same general area. RCW 36.70A.540(2)(g). Payment in lieu of housing units may be allowed "if the jurisdiction determines that the payment achieves a result equal to or better than providing the affordable housing on site." RCW 36.70A.540(2)(h). However, in-lieu payment is limited to an amount that "does not exceed the approximate cost of developing the same number and quality of housing units that would otherwise be developed." *Id.* Thus the fee-in-lieu is derivative of the performance obligation. The permissible amount of the fee must be evaluated with reference to the cost of the performance obligation that would otherwise apply. Giving deference to the City, as we must, it appears reasonable to the Board that over the past seven to twelve years the subsidy needed to develop affordable housing downtown has likely increased; thus the increase in in-lieu fees is unlikely to result in downtown affordable housing production beyond what the performance option requires.

The Board finds Koontz has provided no evidence that the fee adjustment and premium "expand" the programs compared to the square footage that would otherwise be necessary to earn a performance bonus.

Koontz objects that the City's "inflationary increases" to the fee-in-lieu "failed to account for the increased cost of development of commercial and market-rate residential development."[25] Koontz argues the GMA requires "quantifiable 'dollar-per-square-foot-basis' data on the present gap between affordable housing and Downtown Seattle market-rate development."[26] The Board notes Koontz failed to put into the record any data in support of

[24] Koontz Prehearing Brief, at 9-10.
[25] Koontz Prehearing Brief, at 16.
[26] Koontz Prehearing Brief, at 17. (emphasis in original)

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its argument.[27] The City, on the other hand, had before it the Spectrum study for the South Lake Union housing bonus program.[28] Spectrum quantified the value of added building height in South Lake Union under the proposed bonus program to determine how many affordable housing units could be required while still allowing a reasonable return on investment. The study concluded the in-lieu fee could be raised to $80 per net square foot and still provide the developer of a high-rise project with a reasonable return. In developing its analysis, Spectrum drew primarily from recent projects in downtown Seattle and near-in areas such as Belltown, Capitol Hill and South Lake Union. The City reasonably incorporated this analysis into its consideration of the downtown fee adjustments in the Ordinance, as the Spectrum data was largely derived from downtown development. Indeed, while the Board can take official notice of the volatility of the commercial real estate market, it is reasonable to assume, especially with downtown construction cranes in full view,[29] that job growth in downtown Seattle, development trends favoring central cities, and demographic shifts toward urbanization all have increased the value of additional height and density for downtown developers.

The Board finds Koontz has failed to provide any evidence that the cost of the fee adjustments exceeds the benefits of the downtown bonuses.

Koontz further contends the fee adjustments must be an expansion of the program because the inflation escalator is not justifiable.[30] Koontz points to an email colloquy among three city council members discussing inflationary indexes other than the CPI which might be preferable to determine the fee-in-lieu escalator. One council member, who subsequently voted for the CPI inflation adjustment, said CPI "is at best a weak proxy for the right

[27] The challenged Ordinance was formally before the City Council for four months prior to adoption (Index # 37, Council staff memorandum, Sept. 18, 2013) and under committee discussion for six months previous (Index # 2, Burgess proposal, March 14, 2013). Yet the parties have provided no data or analysis from the Seattle downtown business or development community calling into question the Spectrum study or the data on which it was based. Neither party here has pointed to any fact-based critique in the record.
[28] Index # 57. Spectrum Development Solutions, South Lake Union Affordable Housing Bonus Program Review, March 12, 2013.
[29] Koontz acknowledges the "surging pace of Downtown Seattle development." Koontz Prehearing Brief, at 11.
[30] Koontz oral argument at hearing on the merits.

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number," and "there is really no intellectual justification for it." [31] The Board has previously questioned the evidentiary value of city council member emails, except as a marker for what topics the decision makers considered.[32] Here the Board has been presented with no alternative inflation calculator.

The Board finds Koontz has not met its burden of proof to show that the inflation escalator used by the city is not justifiable.

Finally, Koontz argues the inflation adjustment and premium must be an expansion because they might actually produce more affordable housing. At the hearing, Koontz argued the fees "expand the ability to provide housing." Koontz points out since the inception of Seattle's programs, developers have uniformly chosen to pay the fee rather than develop housing units.[33] While the fee adjustment and premium may not be enough to persuade a builder to choose the performance option, the increased dollars in the City's affordable housing fund will allow the building of more housing units, according to Koontz. However, so long as the dollars collected are less than the cost of performance, the affordable housing built as a result of the fund cannot be deemed an "expansion" even by the Koontz definition.

The Board finds Koontz has failed to carry its burden of demonstrating the fee changes constitute an expansion of Seattle's affordable housing bonus program within the meaning of RCW 36.70A.540.

Koontz's argument for additional bonus incentives also misreads the statute. RCW 36.70A.540(3) mandates that "increased residential development capacity" be provided when a voluntary affordable housing bonus program is adopted or expanded. Koontz reads

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[31] Index # 6, p. 3, Council member Richard Conlin.

[32] *Wold v. City of Poulsbo*, CPSMHB Case No. 10-3-0005c, Order on Motions to Supplement the Record (May 11, 2010), at 5-6, cautioning on supplementation with council member emails:

> First, the GMA requires that Growth Boards include former local officials as Board members. The Statute anticipates that such members will bring their unique experience to their case deliberations. . . . As such, we are skeptical of the probative value of Council and Mayor emails. Emails exchanges are by their nature fragmentary and ephemeral. They are often sent without review for factual accuracy and thus are not likely to provide proof of facts. . . . Council members are expected to have wide-ranging discussions, perhaps play devil's advocate, and explore options. Individual motivations are not determinative. The Board's decision concerning GMA compliance must focus on the adopted ordinance and the Comprehensive Plan itself.

[33] *See* Index # 10, Development projects July 2001-December 2012.

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"increased" as meaning additional benefits beyond what was allowed under the program before the fee adjustment. Koontz contends that "increased residential development capacity" means "new incentives" must be enacted when a program is modified.[34] Referring to the dictionary, Koontz says "increased" means "more in number." But that begs the question: more than what?

While the statute does not define "increased," it clearly indicates the base line for the required "increased residential development capacity." Section 540(1)(c) provides the reference point for any "increase," when it states that a developer opting not to participate in the incentive program is entitled to prompt permit issuance "consistent with zoning and development standards on the subject property absent incentive provisions of this program." Thus the base line is the development allowed under the zoning "absent incentive programs," i.e., without bonuses. The "increased" capacity required by the statute is an increase over the base zoning. Without dispute, Seattle developers are allowed to increase their height and floor area by participating in the incentive program through performance or a fee-in-lieu.

This reading of the statute harmonizes with the provision that specifically limits the fee-in-lieu to a "payment [that] does not exceed the approximate cost of developing the same number and quality of housing units that would otherwise be developed." RCW 36.70A.540(2)(h). Presumably the cost of housing unit development generally rises over time. Koontz has not provided any evidence that the adjusted fees – even with a 20% premium – are higher than the costs of developing comparable housing units. There has been no competent challenge to the City's determination that the adjusted fees and premium together are less, on a dollar per square foot basis, than the gap between affordable and market rate housing.[35] Other than the cap limiting fees to the approximate cost of developing the same units, RCW 36.70A.540 provides no standard for determining whether the appropriate amount of benefit has been provided relative to the burden imposed.

[34] Koontz Prehearing Brief, at 15.
[35] Index # 37, Seattle City Council staff report, September 18, 2013, p. 2.

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The Board finds no basis in RCW 36.70A.540 to require additional incentives in connection with a fee adjustment where the program already provides "increased residential development capacity" over the base zoning and the fee does not exceed the cost of building the affordable units.

Conclusion

The Board finds the Ordinance is not an expansion of the City of Seattle's affordable housing incentive programs. **The Board finds** Koontz has failed to demonstrate a violation of the statutory requirement to provide increased development capacity. The Ordinance is not clearly erroneous. Koontz has failed to carry its burden of proving the City's action violates RCW 36.70A.540. Legal Issue 1 is **dismissed**.

Legal Issue 3 – Consistency with City Comprehensive Plan

> Issue 3. Does the Ordinance violate RCW 36.70A.040 because it is inconsistent with the Comprehensive Plan, including policies UVG-4, UVG-7, UVG-8, UVG-20, UVG-29, UVG-31, UVG-32, UVG-34, H-8, DT-G2, and DT-HP3?

Applicable Law and Policies

RCW 36.70A.540(3) provides that affordable housing incentive programs should address the need for increased residential development "consistent with local growth management and housing policies." The jurisdiction should identify the geographic area where increased residential development "will assist in achieving local growth management and housing policies." RCW 36.70A.540(3)(a).

Koontz' Legal Issue 3 cites to a number of comprehensive plan policies with which the Ordinance is allegedly inconsistent, focusing in particular on policies directing growth to the City's designated urban centers.[36] Legal Issue 3 also presents several comprehensive plan housing policies:

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[36] Legal Issue cites the following comprehensive plan policies promoting focused urban growth:

> **UV**G-4 Direct the greatest share of future development to centers and urban villages and reduce the potential for dispersed growth along arterials and in other areas not conducive to walking, transit use, and cohesive community development.

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DT-HP3 Address the demand for housing generated by downtown growth that is not being met by the private market, and help offset the pressure of downtown growth on existing affordable housing resources, through provisions to encourage the development of affordable housing, especially for households with incomes between 0 percent and 80 percent of the median income for the region. To this end, within downtown office, retail, mixed use commercial, and mixed use residential areas with established base and maximum density limits, generally allow bonus floor area conditioned upon a voluntary agreement for the provision of lower income housing or a payment to a fund for that purpose. To further downtown housing goals, limit housing developed through the bonus program to areas permitting housing within the boundaries of the Downtown Urban Center, except that additional areas may be included if such an expansion of the program would be consistent with the goals of both the Downtown Urban Center Plan and the adopted policies of other relevant neighborhood plans. Density bonuses shall not be granted for any housing developed within the Pike Market Mixed zone, where other mechanisms are available to achieve the housing objectives of this land use district.

Require that housing provided for density bonuses serve a range of lower-income households, particularly those with incomes below 80 percent of median income, based on the estimated additional needs resulting from new commercial or residential development. Take into account, in determining the

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UVG-7 Accommodate the City's existing and future housing needs through maintenance of existing residential neighborhoods and the creation of new residential neighborhoods. Encourage housing development so that by 2024, a citywide ratio of 1.8 jobs per household is maintained.

UVG-8 Use limited land resources more efficiently and pursue a development pattern that is more economically sound, by encouraging infill development on vacant and underutilized land particularly within urban villages.

UVG-20 Encourage housing development so that by 2024, the ratios of jobs per household shown on the following chart are achieved: [Center City – 4.2]

UVG-29 Encourage growth in locations within the city that support more compact and less land-consuming, high quality urban living.

UVG-31 Plan for urban centers to receive the most substantial share of Seattle's growth consistent with their role in shaping the regional growth pattern.

UVG-32 Encourage growth in Seattle between 2004-2024, to be generally distributed across the city as shown in Figure 8. [Urban centers targeted for 58% of household growth and 73% of job growth.]

UVG-34 Achieve growth in urban centers, manufacturing/Industrial centers, hub urban villages and residential urban villages that is consistent with the 20-year residential and employment growth targets contained in Urban Village Appendix A.

DT-G2 Encourage economic development activities consistent with the Comprehensive Plan to attract and retain businesses and to expand employment and training opportunities for Seattle area residents.

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amount of housing to be provided, the value of the increased development potential in relation to the cost to the developer, and the extent to which use of bonus floor area is desirable in light of the City's planning goals. Review bonus provisions for housing periodically to consider changes in impacts on housing need, land prices, housing production costs, progress towards planning goals, and other factors.

H8 Consider providing incentives that encourage public agencies, private property owners and developers to build housing that helps fulfill City policy objectives. Examples of development incentives include height and density bonuses, minimum densities and transferable development rights. Consider programs that make maximum use of City resources such as bridge loans, credit enhancement, and tax exemptions.

The City in response references additional policies, including several that specifically address incentive zoning:[37]

DT-G10 Seek to significantly expand housing opportunities in downtown Seattle for people of all income levels with the objectives of:
1. accommodating household growth;
2. at a minimum, maintaining the existing number of occupied low income units; and
3. developing a significant supply of affordable housing opportunities in balance with the market resulting from the growth in downtown employment. Allow housing in all areas of the Downtown Urban Center except over water and in industrial areas, where residential use conflicts with the primary function of these areas. Target public resources and private development incentives, such as density regulations and development standards that encourage housing, to promote the amount and type of housing development necessary to achieve downtown neighborhood housing goals. Address, in

[37] The City also refers to:

DT-HP2 To strive to achieve an adequate balance in employment and housing activity and to meet downtown housing goals, promote public and private actions for developing a significant supply of affordable downtown housing to help meet demand generated by downtown employment growth. Public/Private Partnerships. Work with downtown neighborhoods, businesses, and public and non-profit organizations to meet downtown housing goals, especially with regard to implementing programs to develop and maintain affordable downtown housing units….

DT-HP4 Promote the integration of downtown residents of different income levels by encouraging new development that includes units affordable to households with a range of incomes, including low-income residents. Seek through the administration of funds available for new low-income housing to encourage projects with units affordable to households with a range of incomes, and consider additional incentives for promoting this type of development.

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part, the impact of high-density commercial development on the downtown housing supply by allowing increased development density through voluntary agreements to produce and/or preserve housing through cash contributions, floor area bonuses or the transfer of development rights.

H31 Promote the continued production and preservation of low-income housing through incentive zoning mechanisms, which include density and height bonuses and the transfer of development rights. Consider expanding the use of incentive zoning for affordable housing in neighborhoods outside downtown, particularly in urban centers.

Positions of the Parties

Koontz asserts the City's declared intention to promote density in its downtown urban center is frustrated by the Ordinance provisions which "immediately increased the cost to achieve the existing maximum development potential in the Downtown Urban Center by between 22 to 43%." The result, Koontz contends, is a "corresponding decreased incentive to pursue downtown Seattle urban infill and an underutilization of urban land capacity."[38] Thus the Ordinance thwarts numerous comprehensive plan policies calling for dense development and economic growth in the city's downtown core, says Koontz, citing UVG-4, UVG-7, UVG-8, UVG-20, UVG-29, UVG-31, UVG-32, UVG-34, H-8, DT-G2, and DT-HP3.

The City responds that the comprehensive plan recognizes the tension between high value commercial and residential development downtown and the need for affordable workforce housing close to the employment center. Incentive zoning, by its nature, increases the cost of development in exchange for certain public benefits, the City explains.[39] The City cites a number of comprehensive plan policies which call for incentive zoning as one strategy to subsidize affordable housing in the city center, DT-G10, DT-HP2, DT-HP3, DT-HP4, H-8, H-31.

Discussion and Analysis

In *Chevron USA, Inc. v. Hearings Board*, the Court of Appeals defined "consistency" as applied to GMA plans and regulations: "Consistency means that provisions are

[38] Koontz Prehearing Brief at 20
[39] City Response, at 18.

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compatible with each other – they fit together properly. In other words, one provision may not thwart another." [40] WAC 365-196-210(7) defines consistency as:

> "Consistency" means that no feature of a plan or regulation is incompatible with any other feature of a plan or regulation. Consistency is indicative of a capacity for orderly integration or operation with other elements in a system.

Establishing a development regulation's inconsistency with comprehensive plan goals is a difficult hurdle to surmount.[41] The Board's determinations of inconsistencies in its recent decisions have found such violations where there is direct conflict between the comprehensive plan goal or policy and the adopted development regulation.[42] As the Board stated in *Leenstra*:

> A finding of inconsistency requires a showing of actual conflict between competing provisions of a city's planning policies and development regulations. There is no inconsistency if it is possible for a particular development to meet the requirements of both sets of policies or regulations. Moreover, a city's planning goals cannot be examined in isolation from one another . . . .[43]

Comprehensive plans by their nature address a range of public policy goals which require balanced consideration. Thus, "[I]t would be inappropriate to consider individual comprehensive plan goals in isolation from one another or to consider individual development regulations without looking at all related comprehensive plan policies. While a specific development regulation may not appear to foster fulfillment of a specific planning goal, it may clearly serve to carry out a different comprehensive plan goal."[44]

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[40] 123 Wn. App. 161, 167, 93 P.3d 880 (2004), ***aff'd*** 156 Wn.2d 131 (2005); *see City of Shoreline v. Snohomish County*, Coordinated Cases 09-3-0012c and 10-3-0011c, Final Decision and Order (May 17, 2011), at 13: County's designation of an urban center that would cause adjacent city's transportation and capital facilities plans to be out of compliance with GMA violated the interjurisdictional consistency requirement of RCW 36.70A.110.

[41] *Friends of the San Juans v. San Juan County*, GMHB Case No. 13-2-0012c, Final Decision and Order (Sep. 6, 2013), at 23.

[42] *Peranzi v. City of Olympia*, GMHB 11-2-0011, Final Decision and Order (May 4, 2012), at 21-22; *C. Dean Martin v. Whatcom County*, GMHB 11-2-0002, Final Decision and Order (Oct. 12, 2010), at 16-17.

[43] *Leenstra v. Whatcom County*, WWGMHB 03-2-0011, Final Decision and Order (Sep. 26, 2003), at 15.

[44] *Glen Cook and Kathleen Heikkila v. City of Winlock*, WWGMHB 09-2-0013c, Final Decision and Order (Oct. 8, 2009), at 35.

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Seattle's comprehensive plan contains numerous policies supporting dense development in the downtown urban center as well as many policies promoting affordable housing preservation and development. Koontz contends the higher cost of housing bonuses under the Ordinance will drive developers away and thwart the policies calling for urban density and economic growth downtown. The record indicates the City Council considered this question, Councilmember Clark commenting "we can be realistic about the real effect a large change in fee-in-lieu would have." [45] However, Koontz has provided no evidence that the fee increases actually discourage development of additional height and density in the current or projected real estate market. No calculations have been submitted suggesting the city will fail to meet downtown growth targets. Nor is there evidence of developers opting to build elsewhere in the region because of the downtown Seattle fee adjustments.

The Board notes the only competent evidence in the record is the City's return-on-investment analysis for the South Lake Union rezone, the Spectrum study, which projects a reasonable return to developers with even higher fees and premium than those adopted.[46]

The Board looks at Seattle's comprehensive plan policy DT-HP3:

> Take into account, in determining the amount of housing to be provided, the value of the increased development potential in relation to the cost to the developer, and the extent to which use of bonus floor area is desirable in light of the City's planning goals. Review bonus provisions for housing periodically to consider changes in impacts on housing need, land prices, housing production costs, progress towards planning goals, and other factors.

Policy DT-HP3 requires a particular analysis "in determining the amount of housing to be provided." However, Ordinance 124388 makes no change in the amount of housing to be provided. Rather, the Ordinance modifies the fee-in-lieu amount. Thus policy DT-HP3 requires no special analysis here. Even if there were such a requirement, Koontz has submitted no evidence showing that the Spectrum study is insufficient. The record shows

[45] Index # 6, p. 1.

[46] A glance at the downtown Seattle skyline makes it apparent a number of the Downtown zones allow buildings considerably higher than the 240' highrise that was Spectrum's model for its South Lake Union bonusing analysis, suggesting a higher value for downtown bonuses.

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the City Council considered the fee amendments for the downtown zones concurrently with the South Lake Union rezones but decided, for procedural reasons, that the downtown changes needed a separate ordinance which was enacted a few months later.[47] The Council had before it the Spectrum study based on data drawn primarily from downtown projects, demonstrating "the value of the increased development potential in relation to the cost to the developer," as stated in DT-HP3. Spectrum commented: "If the goal of the City is to incentivize performance under Incentive Zoning to create mixed-income communities then, from a policy standpoint, the pay in lieu fee should be set higher than the Impact of Affordability of the targeted percentage of affordability to induce performance."[48]

In short, Seattle's comprehensive plan contains numerous policies to promote intense development in the downtown urban center and numerous policies promoting affordable housing downtown. Addressing the tension between these goals, Seattle's incentive programs "allow bonus floor area conditioned upon a voluntary agreement for the provision of lower income housing or a payment to a fund for that purpose." DT-HP3.

The Board finds Koontz has not carried its burden of demonstrating any of the cited policies is thwarted by the fee-in-lieu provisions of Ordinance 124388.

In sum, the City weighed policies supporting economic development downtown and policies supporting affordable housing, made its own analysis, and reached a reasonable conclusion within the framework of RCW 36.70A.540. The City's action is supported by facts in the record.

The Board finds the City's action is not clearly erroneous.

Conclusion

The Board finds Koontz failed to carry its burden of demonstrating inconsistency between the Ordinance and the comprehensive plan policies cited. The City's adoption of the Ordinance did not violate consistency requirements of the GMA. Legal Issue 3 is **dismissed.**

[47] Index # 10, Council staff report, Sept. 18, 2013.
[48] Id. at 10

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Invalidity

Koontz requests a finding of non-compliance and a determination of invalidity. Given the Board's ruling on Legal Issues 1 and 3, there is no basis for an order of invalidity.

IV. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the Growth Management Act, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- Petitioner Koontz Coalition has failed to carry its burden of demonstrating the City's adoption of Ordinance 124388 violates RCW 36.70A.540 or RCW 36.70A.040(3). The petition for review is **dismissed.**
- Case No. 14-3-0005 is **closed**.

SO ORDERED this 19th day of August, 2014.

_____
Margaret Pageler, Board Member

_____
Cheryl Pflug, Board Member

_____
William Roehl, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.[49]

[49] Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840.
A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.

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